Supreme Court, U.S.
FILED
JUN 3 1997
OFFICE OF THE CLERK

No. 96-1498

In The

Supreme Court of the United States

October Term, 1996

SCIOTO COUNTY REGIONAL WATER DISTRICT NO. 1, AUTHORITY,

Petitioner,

v.

SCIOTO WATER, INC., and DANIEL R. GLICKMAN, Secretary, United States Department of Agriculture,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITIONER'S REPLY BRIEF

Of Counsel:
LOUIS T. ROSENBERG
LOUIS T. ROSENBERG, P.C.
De Mazieres Building
322 Martinez Street
San Antonio, Texas 78205

Counsel of Record
RALPH W. TARR
ANDREWS & KURTH L.L.P.
601 S. Figueroa Street
Los Angeles, CA 90017
(213) 896-3100
Counsel for Petitioner

June 4, 1997

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

13 pp

TABLE OF CONTENTS

Page

INTRODUCTION 1

ARGUMENT 1

I. The Decision of the Sixth Circuit Creates a True, Direct, and Irreconcilable Conflict with the Relevant Decisions of This Court Concerning the Proper Judicial Construction of Federal Statutes 1

A. The Sixth Circuit Decision Fails to Give Effect to the Clear and Unambiguous Language of Section 1001(g) of OBRA .. 1

B. Federal Respondents' Administrative Actions Cannot Defeat the Clear and Unambiguous Language of Section 1001(g) 3

C. The Sixth Circuit did not and Could not Defer to the January 10, 1989 Notice as a Settled Administrative Interpretation 5

II. The Decision of the Sixth Circuit Creates a True, Direct and Irreconcilable Conflict with the Decision of the Colorado Supreme Court in *Ute* 6

III. The Sixth Circuit Did Not Reach the Proper Result in This Case, Which Presents an Important Federal Legal Question of First Impression 7

CONCLUSION 10

TABLE OF AUTHORITIES

Page

CASES

Ardestani v. INS, 502 U.S. 129, 112 S.Ct. 515, 116 L.Ed.2d 496 (1990) 5

Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984) 5

City of Grand Junction v. Ute Conservancy District, 900 P.2d 81 (Colo. 1995) 2, 5, 6, 10

Dunn v. Commodity Futures Trading Commission, ___ U.S. ___, 117 S.Ct. 913, 137 L.Ed.2d 93 (1997) 2, 6

Moser v. U.S., 341 U.S. 41, 71 S.Ct. 553, 95 L.Ed. 729 (1951) 8

U.S. v. Winstar Corp., ___ U.S. ___, 116 S.Ct. 2432, 135 L.Ed.2d 964 (1996) 8

STATUTES

Omnibus Budget Reconciliation Act of 1986, Pub. L. No. 99-509, 7 U.S.C. §1929a ..... *passim*

Agricultural Credit Act
Section 803 4

INTRODUCTION

Respondents rest virtually all of their arguments against granting the Petition upon facts that are irrelevant under this Court's precedents concerning interpretation of statutes. In Section 1001(g) of OBRA,[1] Congress clearly and unambiguously specified that the protections of 7 U.S.C. §1926(b)[2] are to apply to *all* sales of certain notes and other obligations, making no distinction between a sale of Petitioner's bonds to a third party and one to Petitioner. Federal Respondents do not have discretion under Section 1001(g) to structure the sale transaction in a manner that defeats this intent. The Sixth Circuit erred in relying on the irrelevant facts created by Federal Respondents, and on the effect of those facts claimed by Respondents, to reach a result directly contrary to the clear and unambiguous intent of Congress.

ARGUMENT

I. The Decision of the Sixth Circuit Creates a True, Direct, and Irreconcilable Conflict with the Relevant Decisions of This Court Concerning the Proper Judicial Construction of Federal Statutes.

A. The Sixth Circuit Decision Fails to Give Effect to the Clear and Unambiguous Language of Section 1001(g) of OBRA.

The language of Section 1001(g) is clear, unambiguous and unequivocal: the service area protections of §1926(b) *"shall* be applicable to *all* notes or other obligations *sold* or *intended to be sold"* under Section 1001,

---

[1] OBRA refers to the Omnibus Budget Reconciliation Act of 1986, Pub. L. No. 99-509, 7 U.S.C. §1929a, note. Subsequent references herein will simply be to "Section 1001".

[2] Subsequent references herein will simply be to "§ 1926(b)".

without exception. (*Ute*, Pet.App., pp. 52a-54a.)[3] Respondents assiduously avoid analysis of the language of Subsection (g).[4] Nevertheless, their argument concedes Congressional intent in Section 1001(g) to save the service area protections of §1926(b).[5] Furthermore, neither of the Respondents maintain that the plain language of Section 1001(g) distinguishes between sales to third parties and sales to debtor districts.

Instead, both Respondents frame their respective Questions Presented in terms of §1926(b) and argue that the continued applicability of the service area protections is governed by §1926(b).[6] Respondents assume that Petitioner's bonds were discharged and the federal indebtedness terminated upon repurchase of its notes pursuant to Subsection 1001(f). Respondents, as did the Sixth Circuit,

---

[3] *City of Grand Junction v. Ute Conservancy District*, 900 P.2d 81 (Colo. 1995) ("*Ute*"). The opinion is reprinted in the Appendix to the Petition ("Pet.App.").

[4] Respondent Scioto Water, Inc. ("SWI") does not even mention that section. Federal Respondents simply deny Petitioner's reading of Section 1001(g) and then state that it "provides only the notes and obligations *sold* under that section are governed by § 1926(b)." Fed. Opp., pp. 7-8. Federal Respondents treat the phrase "intended to be sold" as mere surplusage. This Court's precedents preclude such statutory construction. *Dunn v. Commondity Futures Trading Commission*, ___ U.S. ___, ___, 117 S.Ct. 913, 914, 137 L.Ed.2d 93, 101 (1997). See n.16, *infra*.

[5] Respondents acknowledge the effect of Subsection (g) in the third party context. (*See*, SWI Opp., p. 18). When a third party purchases the obligations there is no further *federal* indebtedness and, therefore, without the savings provisions of Subsection (g) the service area protections would be lost under the judicial precedent interpreting §1926(b).

[6] See n.4, *supra;* Fed. Opp., pp. 7-8. Respondents contend that the scope of the savings provisions of Section 1001(g) is governed by the language of the very statute which sets forth the protections to be saved.

then focus upon the language of §1926(b) precluding curtailment or limitation of the service area "during the term of the loan", and the case law holding that this language establishes a requirement of an outstanding federal indebtedness. (Fed. Opp., p. 8, n.6.) The argument concludes that Petitioner lost the service area protections of §1926(b), under the terms of that statute, instantaneously upon repurchase of its bonds.

The ultimate result of this reasoning is to completely frustrate the clear intent of Congress. (*Ute*, Pet.App., p. 54a). The underlying assumption that Petitioner's bonds were discharged and any indebtedness terminated upon the repurchase is not supported by Section 1001(g), and given the legal effect the Sixth Circuit and Respondents draw from this assumption, it is erroneous. There is no reason to conclude that Congress intended any effect of such a sale other than that Petitioner would hold its own bonds and make payments to itself "during the term of the [bonds]",[7] just as a third party purchaser would have held the bonds and received payments thereunder from Petitioner during the term of the bonds.

B. Federal Respondents' Administrative Actions Cannot Defeat the Clear and Unambiguous Language of Section 1001(g).

Both Respondents, as did the Sixth Circuit, rely heavily on the January 10, 1989 notice concerning the Discount Purchase Program ("DPP") (the "Notice"),[8] which implements the right of first refusal mandated by

---

[7] The Ute Water Conservancy District effectively accomplished this result, with the assistance of Federal Respondents, through a series of transactions involving different entities related to the district. (*See, Ute*, Pet.App., pp. 35a-37a, 55a-60a).

[8] A copy of the Notice is reproduced at pages 35a-54a of the Appendix to Respondent SWI's Opposition ("SWI App.").

Congress in Section 1001(f). The Notice reassures the debtor district in the event a third party sale is necessary "the terms and conditions of [its] loan will not change" and debtor districts "will have essentially the same rights, privileges, and obligations after the sale". *Id.* Attachment A to the Notice (SWI App., pp. 39a-54a) states that the permanent debt instrument will be stamped "Satisfied in Full" at the time of final payoff. (SWI App., p. 42a).

The service area protections are not mentioned in these documents, nor is either §1926(b) or Section 1001(g). Despite a paragraph in the Notice (SWI App., p. 37a) and a section in Attachment A entitled "VI. Special Considerations", which urge careful consideration of the financial risks and benefits (SWI App., pp. 52a-53a), these documents at no point warn that Federal Respondents believe that stamping the bonds "Satisfied in Full" will negate the savings provisions of Section 1001(g).

Neither Respondents nor the Sixth Circuit, identify a Congressional grant of discretion to determine the applicability of Section 1001(g).[9] To the contrary, Section 1001(g) does not condition its application on any administrative action. In sum, Congress did not give Federal Respondents the power to bargain for this term.[10] The

---

[9] Federal Respondents offhandedly quote Section 1001(a) requiring the sale of certain obligations "under such terms as the Secretary may prescribe". (Fed. Opp., "Statement", p. 3). Although this language provides some discretion with respect to the mechanics of sale, it is not intended to override the terms and conditions specified by Congress in Subsections (b) through (e), and cannot be read to overcome the specific terms and conditions set forth in Subsections (f) and (g), which were added a year later by Section 803 of the Agricultural Credit Act of 1987, Pub. L. No. 100-233, Title VIII, §803, 101 Stat. 1714 (1988).

[10] That Congress mandated a "right of first refusal" is consistent with the definitive language of Section 1001(g),

actions and intent of the Federal Respondents in structuring the transaction, then, are irrelevant. The marking of Petitioner's bonds "paid in full" cannot defeat the saving effect of Section 1001(g) intended by Congress.

C. The Sixth Circuit did not and Could not Defer to the January 10, 1989 Notice as a Settled Administrative Interpretation.

Under this Court's precedents, the threshold statutory construction inquiry is whether Congress addressed the issue in the language of the statute itself. "The 'strong presumption that the plain language of the statute expresses congressional intent is rebutted only in rare exceptional circumstances'." *Ardestani v. INS*, 502 U.S. 129, 135, 112 S.Ct. 515, 520, 116 L.Ed.2d 496, 505 (1990). Only if Congress entirely failed to address the issue or did so ambiguously should a court even consider administrative interpretation. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843, 104 S.Ct. 2778, 2781-82, 81 L.Ed.2d 694, 703 (1984). In this case, the statute is clear and unambiguous on its face. Neither Respondents nor the Sixth Circuit find any ambiguity in the statutory language.[11] Thus, the Notice is not entitled

---

because that right presumes the extension of an opportunity to purchase on the same terms and conditions as to a third party purchaser, except as those terms and conditions are specifically altered by the express provisions of Subsection (f).

[11] In fact, in attempting to distinguish the *Ute* decision based upon the manner in which Federal Respondents structured the respective transactions, Respondents and the Sixth Circuit implicitly acknowledge that Congress intended Section 1001(g) to apply to sales to debtor districts and maintain that the Federal Respondents have discretion whether to apply the savings provisions. They implicitly argue that Section 1001(g) *authorizes* rather than *directs* saving the §1926(b) protections.

to consideration, let alone deference, as urged by Respondent SWI.[12] *See, Dunn v. Commodity Futures Trading Commission*, ___ U.S. ___, 117 S.Ct. 913, 920, n.14, 137 L.Ed.2d 93, 105, n.14 (1997).

II. The Decision of the Sixth Circuit Creates a True, Direct and Irreconcilable Conflict with the Decision of the Colorado Supreme Court in *Ute*.

Both Respondents and the Sixth Circuit seek to distinguish the decision of the Colorado Supreme Court in *Ute* on the basis that in *Ute* the parties intended not to discharge the bonds involved, but intended for the bonds to remain outstanding. (Fed. Opp., pp. 7, 9-10; SWI Opp., pp. 17-18). The Federal Respondents in *Ute* specifically and intentionally structured the transaction so as to avoid discharging the debt instrument. (*Ute*, Pet.App., pp. 58a-60a.) Thus, Respondents, and the Sixth Circuit, seek to distinguish *Ute* on the implicit basis that Federal Respondents had discretion to structure the Ute Water Conservancy District transaction differently from Petitioner's transaction so that the former enjoyed the savings provisions of Section 1001(g) while Petitioner does not.

In addition, contrary to the Sixth Circuit's decision (SWI Opp., pp. 16-17), the Colorado Supreme Court did not rely on state law, but rather found that the federal statutory scheme preempts state law with regard to bond redemption issues. (*Ute*, Pet.App., p. 42a). At the same time, the Sixth Circuit decision endorses the District Court's opinion that Section 1001(g) applies only to third parties. (*Ute*, Pet.App., p. 10a.)

---

[12] In any case, the District Court, which through a strained interpretation not embraced by Respondents, did find ambiguity in the statutory language of Section 1001(g) (*See*, Pet.App. at pp. 24-25), but refused to find a settled administrative interpretation. Op. D.C., p. 14, n.8.

Thus, the Sixth Circuit decision is in direct conflict with the *Ute* decision. The Colorado Supreme Court determined that Section 1001(g) "*authorized* the FmHA to sell all notes or other obligations without removing the protection provided to rural districts under section 1926(b), including selling the . . . bond back to the issuer." (Pet.App., p. 53a.) Through this holding, given that there is no statutory grant of such discretion,[13] the Court also implicitly determined (though it could resolve the case before it without expressly doing so) that Section 1001(g) *directed* that result.

III. The Sixth Circuit Did Not Reach the Proper Result in This Case, Which Presents an Important Federal Legal Question of First Impression.

Respondents imply that the Sixth Circuit reached the proper result in this particular case, and therefore this Court should deny the Petition. Respondent SWI implicitly suggests either that Petitioner waived its statutory right to continued service area protection or otherwise bargained it away. (SWI Opp., pp. 3, 4, 8, 15, 22). Neither of these implications is accurate, and the Sixth Circuit did not make such a finding.

Any reference in the Notice to the bonds being stamped "Satisfied in Full" as part of the transaction are irrelevant to the legal effect of Section 1001(g) and of no concern to Petitioner.[14] Petitioner could not be found to have bargained away its rights under §1926(b) because Federal Respondents had no authority under Section 1001 to engage in such a bargaining process or to require Petitioner to relinquish those statutory rights as they now seem to suggest. Furthermore, nothing in the Notice

---

[13] See discussion in Section I. B., *supra*.

[14] In fact, Petitioner would expect some confirmation that it was no longer indebted to the federal government once the purchase price of the bonds was paid.

contemplated any such bargaining process. For the same reasons, Petitioner could not be found to have waived its statutory rights created by Congress. Furthermore, in the absence of any discussion in the Notice of potential loss of service area protection,[15] it could not be established that Petitioner knowingly and voluntarily relinquished those rights. *See, Moser v. U.S.*, 341 U.S. 41, 47, 71 S.Ct. 553, 556, 95 L.Ed. 729, 734 (1951).

Respondents imply that the discounted sale price establishes a bargained for relinquishment of service area protection. Respondents, however, acknowledge that Section 1001(g) operates to save the service area protections with respect to discount sales to third parties. In fact, in the first year of the program FmHA sold obligations to third parties at an enormous discount, as one might expect in such a commercial transaction, without disturbing the protections of §1926(b). In Section 1001(f), Congress simply accorded that same opportunity to debtor districts first. Congress did not intend to penalize debtor districts for purchasing their own notes, as evidenced by Congress' concurrent passage of Section 1001(g) (*Ute*, Pet.App., p. 54a) and debtor districts would not have purchased their own notes if they believed that it would jeopardize the protections of §1926(b). In the words of this Court in *U.S. v. Winstar Corp.*, ___ U.S. ___, ___, 116 S.Ct. 2432, 2472, 135 L.Ed.2d 964, 1012-13 (1996):

> It would, indeed, have been madness for respondents to have engaged in these transactions with no more protection than the Government's reading would have given them, for the very existence of their institutions would then have been in jeopardy from the moment their agreements were signed.

---

[15] Therefore, the negative implication urged by Respondent SWI (SWI Opp., p. 15) with respect to references in these documents to a possible third party sale not altering Petitioner's rights and privileges (SWI App., p. 38a) simply does not arise.

Finally, the two options set forth in the Notice, (SWI Opp., p. 15), are nothing more than the two options established by Congress in Section 1001. Under Section 1001(a), Federal Respondents were to select obligations for sale and, before selling to third parties were to offer them for sale to the debtor district pursuant to Subsection (f). In either case, the sale is made under Section 1001 to meet the net proceeds requirements of Subsection (a), and Section 1001(g) makes it clear that *any* sale does not eliminate the protections of §1926(b).[16] The Notice does not state otherwise.

The Sixth Circuit's decision is therefore erroneous, and, threatens the economic survival of thousands of water districts across America. Without the protections of §1926(b), these rural water districts may no longer be able to service or provide reasonably priced water to hundreds of thousands of rural household customers. Therefore, the issue raised by this case is subject to repeated litigation.[17] The guidance of this Court is critical to the

---

[16] By the phrase "intended to be sold" Congress emphasized this intent, even if the statute is inappropriately split apart in the manner adopted by the District Court to conclude that only a sale to a third party is a sale "under this section". (Op.D.C., pp. 14-16). Thus, the agency would select certain obligations to be sold to meet the net proceeds requirements of Subsection (a). In some cases, it would intend to sell them to third parties, but would instead sell them to debtor districts exercising their right to first refusal under Subsection (f). Thus, the "intended to be sold" phrase in Subsection (g) operates to assure implementation of Congressional intent that the §1926(b) protections not be lost in either case.

[17] In one of the cases described in the Petition as pending, *Rural Water System #1 v. City of Sioux Center, Iowa*, No. C95-4112-MWB, the District Court for the Northern District of Iowa, Western Division, just issued its Memorandum Opinion on May 27, 1997. The Court essentially adopted the analysis of the District Court in this case, that a sale of notes to the debtor district pursuant to Section 1001(f) is not a sale "under this

lives of these entities and their household water customers.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Of Counsel:
LOUIS T. ROSENBERG
LOUIS T. ROSENBERG, P.C.
De Mazieres Building
322 Martinez Street
San Antonio, Texas 78205

RALPH W. TARR
Counsel of Record
ANDREWS & KURTH L.L.P.
601 S. Figueroa Street
Suite 4200
Los Angeles, CA 90017
Counsel for Petitioner

June 4, 1997

---

section" and therefore the savings provisions of Section 1001(g) do not apply. Slip Op., p. 44. The Court further found that Section 1001(g) is not ambiguous, that it clearly applies solely to sales to third parties and does not apply to sales to debtor districts. Slip Op., p. 51. In doing so, the Court relied heavily upon the fact that the notes there involved were marked "paid in full" when they were repurchased and the Court treated them as extinguished. *See, e.g.*, Slip Op., pp. 13, 34, 41, 50, 56. The opinion also acknowledges that the decisions of the Sixth Circuit in this case and of the Colorado Supreme Court in *Ute* are clearly in conflict, Slip Op., p. 41, but specifically adopts the position of the District Court and the Sixth Circuit in this case, *Id.* at p. 56, n.13. Finally, the District Court expressed its doubt that there is a settled administrative interpretation and declined to consider the agency view. Slip Op., p. 46, n.11. Petitioner has lodged a copy of the 81-page Memorandum Opinion with the Clerk of this Court.